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THE NEW NATION.*

IN 1863, among the agreeable surroundings of a London suburb, Mr. James Wilson, then late Minister to Turkey, wrote a book the title of which was: "*The Rise and Fall of the Model Republic*." Mr. Wilson was a Southerner, and, if further elucidation were necessary, his point of view may be gathered from the further statement that he was also the author of an earlier volume entitled, "*The South Vindicated*."

In 1863 the tide of conflict seemed setting in strongly against the North. Bull Run and Gettysburg seemed to presage the final overthrow and downfall of the Nation. Mr. Wilson, therefore, was well justified in sharing the general opinion that the Southern Confederacy would win. So sure was he that the cause of the South must prevail in the appeal to arms that he did not deem it worth while to await the *coup de grace* presently to be administered by the Southern armies. Perhaps being pricked on by an ambitious publisher with a desire to be first in the field, his work chronicling the final victory was brought out before the final end—an example of enterprising journalism still followed to this day.

The book is interesting, however, not as a mere chronicle of an event which he mistakenly believed would come to pass, but as a philosophical analysis of the causes and reasons which led to this conclusion. The kernel of his argument may be gleaned from the following paragraph:

"The Federal Union was in fact but the creature of the States composing it. The Constitution, as justly interpreted by Lord Brougham and other distinguished commentators,

*EDITORIAL NOTE: Of course, the LAW REVIEW is not responsible for the opinions expressed in the articles which it publishes, nor do the editors always agree with them. But we are always glad to publish worthy arguments on either side of legal questions and are especially glad to have articles on both sides of the same question. We hope that some champion of States' rights will favor us with an article setting forth the other side of this great question.

was a mere treaty of alliance, offensive and defensive. The States which were parties to this league, were to remain sovereign."

And, so runs his theme, when the creature attempted to usurp the powers and functions of its creator, it was righteously destroyed.

Until the Civil War, indeed, the doctrine of state sovereignty was the prevailing view, not only among laymen, but lawyers as well. Mr Jefferson, in a letter to Colonel Humphreys, March 18, 1789, defined the nature of the league between the States in the following words:

"The best general key for the solution of the question of the powers between our Governments is the fact that every foreign and federal power is given to the Federal Government and to the States every power purely domestic."

And at another time he wrote:

"The Federal is in truth our foreign government *which department alone* is taken from the sovereignty of the several States."

But, with the triumph of the Union armies the doctrine of state sovereignty perished forever. In his message at the opening of the extra session of Congress on July 4th, President Lincoln defined a sovereignty as "A political community without a political superior." He further said:

"Tested by this, no one of our States, except Texas, ever was a sovereignty. And even Texas gave up the character on coming into the Union. * * * The States have their status in the Union and they have no other legal status. * * * The Union is older than any of the States, and in fact it created them as States. Originally some dependent colonies made the Union, and in turn the Union threw off their old dependence for them and made them States, such as they are. Not one of them ever had a state constitution, independent of the Union."

No argument based in any particular on state sovereignty can ever be tolerated in the arena of constitutional debate. Our fundamental law must always be viewed as an expression of the national will.

But, of course, state sovereignty and state rights are totally different phrases and the destruction of state sovereignty did not by any means destroy the rights which the States possessed. There still remained at the close of that war, and even to this date, abundant room for differences of opinion as to the extent of authority that is entrusted to the Federal Government by the people. In the distribution of power among the many governmental organizations and among the many departments there has always been endless controversy.

In the circumstances of the Civil War, and shortly following it, it was very easy to legislate away many rights which had been claimed to be rights of the States, although President Lincoln showed that in many instances he realized he was treading on precarious constitutional grounds. And, but for the plea of the higher necessity of saving the Union, much that was in fact enacted into laws, or enforced by executive order, would not and could not under rightful interpretation of the Constitution have withstood attack.

The 13th, 14th and 15th amendments to the Constitution came at a time when the States, fresh from their awful experiences of the war, deemed it wise to yield, in large measure, the rights theretofore reserved to them. These amendments and the contemporaneous legislation, not only had the effect of solidifying and strengthening the National Government, but of confirming the centralizing tendencies and forces which the war set in motion.

The great social and industrial development of the country following the Civil War, naturally exercised an enormous influence upon our political institutions, and upon our concepts of government and of the prerogatives of the States and the federal instrumentalities. As Mr. Bryce points out in his introduction to *The American Commonwealth*:

"America changes so fast (in these respects) that every few years a new crop of books is needed to describe the new face which things have put on, the new problems that have appeared, the new ideas germinating among her people, the new and unexpected developments for evil, as well as for good, of which her established institutions have been found capable."

Naturally and inevitably there grew out of this situation a struggle between the States and the national government as to the borderland between their respective spheres of jurisdiction. Nobody has more concisely stated the various agencies which have contributed to the dominance of the centralizing tendencies of this Government than Mr. Bryce as follows:

"To the extensive interpretation by the Judiciary of the powers which the constitution vests in the National Government;

"To the passing by Congress of statutes on topics not exclusively reserved to the States, statutes which have extensively narrowed the field of state action;

"To the exercise of executive power which, having been approved by the people, and not condemned by the courts, have passed into precedents."

Not because he was a pioneer in this respect, but because of the faculty which he possesses of always attracting public attention to his acts and sayings, Mr. Roosevelt is commonly supposed to have more vigorously set the third influence adverted to by Mr. Bryce in motion, than any other of his predecessors. And that he was a firm believer in the wisdom of this policy is exemplified by a speech which he made at Harrisburg in 1906 in which he declared that the power of the Federal Government should be increased "through executive action * * * and through judicial interpretation and construction of law."

Shortly thereafter, Mr. Root, the then head of his Cabinet, declared in an address before the Pennsylvania Society in New York that if the people desired it "sooner or later constructions of the Constitution * * * will be found to vest additional power in the National Government."

"State rights" said President Roosevelt, "should be preserved when they mean the people's rights, but not when they mean the people's wrongs." An example of to what mischievous purposes may be put the use of a catchy phrase.

But this tendency of the executive power, although it may claim Mr. Roosevelt as its putative father, has at least never been disowned by any of his successors. One standing from the viewpoint of a Jefferson or a Hamilton, or of any of the

fathers of the Constitution, would look with mingled feelings of perplexity, astonishment, much regret, and perhaps some joy, at the remarkable aggrandizement of power now claimed and exerted by the executive as matter of course and without public protest, without in the meantime having changed a syllable of the worded charter supposed to be the repository of that power.

It is not the purpose of this paper to review these changes and the growth and development of this constitutional interpretation. In an assemblage of lawyers such work would be but wearisome iteration. They belong to history. The States have become more and more closely knit together. The causes for many of these encroachments upon what were theretofore deemed prerogatives of the States were partly economical, partly moral, largely paternalistic and also largely imperialistic.

The Interstate Commerce Clause is now expanded, not only to embrace the instrumentality of commerce and the commodity itself, but has also taken into its benevolent and all-embracing arms, the child-worker in the factory, the men and servants not only in control of the direct movement of the trains, but engaged in almost any department of railroad service, and their hours, conditions of labor, and wages have become a matter not only of national concern, but control as well.

In 1889, President Wilson, in a brief manual for schools and colleges, dealing with the state and federal governments, illustrated the enormous power reserved to the State in the following language:

"A striking illustration of the preponderant part played by state law under our system is supplied in the surprising fact that only one out of the dozen greatest subjects of legislation which have engaged the public mind in England during the present century would have come within the powers of the Federal Government under the Constitution as it stood before the war, and only two under the Constitution as it stands since the addition of the war amendments. I suppose that I am justified in singling out as these twelve greatest subjects of legislation the following: Catholic emancipation, parliamentary reform, the abolition of slavery, the amendment of the poor-laws, the reform of municipal corporations, the repeal of the corn

laws, the admission of the Jews to Parliament, the disestablishment of the Irish church, the alteration of the Irish lands, the establishment of national education, the introduction of the ballot, and the reform of the criminal law. Of these every one except the corn laws and the abolition of slavery would have been under our system, so far as they could be dealt with at all, subjects for state regulation entirely; and of course it was only by constitutional amendment made in recognition of the accomplished facts of the war that slavery which was formerly a question reserved for state action, and for state action alone, was brought within the field of the federal authority."

But in this year of grace 1917, we can set off as against these domains of legislation, then thought to be beyond the bounds of Congress, the following analogous subjects, all of which have been brought within the exertion of either federal, legislative, or executive power:

1. Extension of the Interstate Commerce Clause by legislation and judicial interpretation to the practical exclusion of substantial state authority.

2. Extension of the application of the constitutional provision giving Congress power to establish post offices and post roads so that it now embraces:

- a. The regulation, if not control, of many kinds of private business;
- b. The regulation of the practice of medicine.
- c. Under the guise of prosecution for misuse of mails to really prosecute in the federal courts for offenses against state statutes and properly justiciable only in state courts.

3. The control of water-ways.

4. The reclamation projects and the laws relating to the land, forestry and mineral reservations.

5. Laws for the promotion of good roads under which the National Government takes upon itself the greater share of the burden for this strictly internal improvement.

6. The Pure Food and Drug Laws extended by departmental rules and judicial interpretation to include practically every article of food or medicine and regulating its manufacture, as well as its sale.

7. The Mann, or the White Slave Act—a police measure pure and simple, designed to regulate private morals.

8. The income, inheritance and profit taxes—laws of such wide and comprehensive scope that they amount to a regulation and control of practically every line of human endeavor.

9. The vast code of departmental rules and regulations having in many cases the force of legislative enactments which bear directly or indirectly upon every variety of business relations.

10. And finally, and as an important consequence of the present war the vast extension of executive power of the Government to include not only the regulation but the possession or ownership as well, wherever deemed necessary, of practically every conceivable industry or business, and the fixing of prices which may be charged for every commodity which may be grown or manufactured.

Let us not be misunderstood. We naturally entertain some pretty positive convictions upon these subjects. But in this paper we are laying all personal views to one side. We are not here to lay a wreath upon the casket of the States' rights, nor on the other hand, to acclaim with huzzas the on-coming of the New Nationalism. We only speak as one plain man to another of those things which we do not see and to note the current of time and events as we do view them.

But, after contemplating the march of the centralizing tendencies of the Government since President Wilson's manual of 1889, he would naturally be forced in any further editions of that work to re-write, if not entirely expunge the paragraph which we have quoted. It is no longer the fact that the States play a preponderant part in our affairs. On the contrary, there is no subject of considerable consequence and concern which has not been invaded and occupied by the national power. No one can blink the fact that the States are fast becoming provinces of a central republic and that their functions will be more and more limited to police measure and those of immediate and local concern.

The natural consequence of the war has been to give tremendous impetus to this centralizing tendency of the Federal

Government. That this was inevitable becomes more and more apparent as we become better acquainted with the nature of the task in which we have become enlisted, and the call upon every line of human endeavor and industry made by modern warfare.

The fight against the bill for compulsory selective service in our armies marked in a way the last gasp of the old-time shibboleth of state rights. We require at this hour of greatest travail and menace to our liberties a strong, vigorous, and central authority. While in peace it may be true that in a multitude of counsel there is wisdom; the correct aphorism in war reads, "In a multitude of counsel there is confusion."

Everyone acquainted with our former military history and policies—the bickering among the States, the refusal to furnish quotas of men and money, the jealous fear that some State might be required to do more than its part, the intolerable delays, vexations and confusions, must view with real solid satisfaction, the swift, steady and sure progress of events since we entered the lists. The contrast between now and then is not only gratifying to our national pride but is illuminating as showing the great march of national power which has occurred since the days when these activities were last before set in motion.

And how our thoughts and hearts involuntarily turn to the noble captain of our ship of state—a second Lincoln, given to lead the world from out the bondage of an accursed autocracy. He who with the keen rapier of his matchless logic, beat down the German blunderbuss upon the field of diplomacy, who picked up the gage of battle flung down by the insolent Bosche and now stands forth, the proclaimed leader and spokesman for all democracies and of the free people of all lands.

With the end of this terrible war things will never become again as they have been before. Let us not deceive ourselves upon that point. We can never go back again to the soft and quiet life which seems so recent and yet through course of events is now so remote from us. With the new birth of freedom which will usher in the renewed nations of now oppressed Europe, will come a regeneration in this land as well.

In the social and industrial readjustments which are bound

to ensue, it is too much to hope that we will not encounter storms and stress which will severely strain our good ship of state, but we know that she is built of strong and sturdy timbers, and believe that she will outride the stress and storms that will overtake and surround her. We believe that in a very real sense we shall emerge from this strife a new nation, with new ideals, and new views of life and of the responsibility of the citizen to his home and to his country. And in this transformation in our national life we also foresee equally radical and fundamental changes in the States, not only in their relation toward their own citizens, but in their attitude toward their sister States and the Nation as well. No longer will "nation" be spelled with a small "n" and by the same token no longer can "state" be spelled with anything larger, at most, than a small "s."

The new problems with which we will be concerned will be not only national and domestic but international as well. In the close bond of communion and business intercourse that will spring from the union of arms with our allies and from the acquaintance and friendships which this war will engender, will come opportunities for national growth and development far beyond our present ken, or our ability to appreciate or realize at the present moment. Our far-sighted business leaders are already sending forth their pioneers who are planting their outposts of vantage and making room for the influx then to come. In that near approaching day the doings of the man in farthest India will be matter of lively concern to us, because we shall have the same business relation and concern in his affairs that we now have with our immediate neighbor in Omaha or Chicago. But it must be a nation which we hail from and who stands sponsor for us to the world. As our soldiers have already taken on the badge of national service and have cast off their insignia of state obedience, so will our soldiers of commerce register from the *United States of America* and not from Missouri or Kansas.

And as the influence and prestige of our country grows abroad and our citizenship becomes more cosmopolitan and international in its character and methods of thought, the same overshadowing influence will more and more enter into our

state and domestic affairs. More and more will the citizen of Missouri become engrossed in business relations and connections with the citizen of Illinois and of New York. He will become restive against the dubious interference attempted to be exerted by the State over his business and affairs which are already subject to national control and concern.

"Why," he will ask, "must I first incorporate under the laws of Missouri and then apply for permission to do business in each of the various States into which my activities may run and be subjected to the conflicting and multiplied burdens and duties incident to such complex relation and control, when the whole matter might be vastly simplified by one charter and one control granted and exercised by the National Government?"

And with the broadening and expansion of our business and the acquaintance engendered by such frequent intercourse, will disappear that great pillar of state rights—"state pride," except in so far as it may be likened to the ordinary civic pride which every well-minded citizen takes in his community. But that narrow, self-centered state pride so largely born out of isolation and lack of acquaintance and intercourse with the people of the other States, will inevitably fall when that isolation is removed and that acquaintance is made.

So that as we look into the future, we can foresee a time not greatly remote, but comparatively near, when the State and its institutions will cease to exist as anything but administrative sub-divisions of the Commonwealth at large, in perhaps much the same relation that our county organization now sustains to the State. In the onrush of the national spirit and life as it will emerge from this war, no other result can be possible. Against the irresistible surge of its forces, statehood and state rights, in so far as they present an obstacle to the full and free growth and development of the national idea, must give way.

And in what spirit shall we contemplate this passing of statehood and state rights? Shall we rejoice, or shall we grieve? As lawyers and philosophers, we answer, "Neither." For us the past is past. Our part is not now and never has been with the days that are gone or with the glories that are departed. The present engages us, and the future beckons. We needs must keep

our eyes clear and minds steady to meet the great obligations and responsibilities which are upon us now, and are yet to come.

But, as men and brothers, we do have the right to indulge in these human emotions, and it is with mingled feelings of sorrow and joy that we must contemplate that great change which is passing before us. Sorrow, as we say good-bye to an old friend that has served us well in the past. Sorrow, as we see a part of the fabric of the garment of our political life which has become worn out with use and lapse of time, discarded and replaced with something new. We lawyers plead guilty to the charge of conservatism, and we cannot contemplate a change so stupendous without an emotion of regret.

But, our feelings partake more of joy as we turn our faces to the new day and the new national life, so full of promise and hope for humanity, which will lie before us. Joy, that the political shackles will have been struck from the poor and oppressed of all lands. Joy, that to the whole world has come a new birth of freedom. Joy, that each Nation is not henceforth to live alone its selfish and self-centered existence, but that generously and broadly human love and human sympathy will be the dominant notes in international relations and affairs.

"Till the war drum throb'd no longer
And the battle flags were fur'd
In the Parliament of man, the Federation
of the world."

Jas. H. Harkless.

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